

Arizona Supreme Court

Committee on Improving Judicial Oversight and Processing of Probate Court Matters

Final Report to the Arizona Judicial Council

June 2011



Committee on Improving Judicial Oversight and Processing of Probate Court Matters

June 2011

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I. Introduction

Approximately twenty-five percent of Arizona's citizens are fifty-five years of age or older. This demographic places unique challenges on the Judicial Branch, including increased filings in the areas of adult guardianships, conservatorships, and increased exploitation and abuse of vulnerable adults. Additionally, disabled children and their parents encounter unique legal and financial issues when the child reaches the age of majority, necessitating court action. Protection of incapacitated and vulnerable individuals is an important concern of the Arizona Judicial Branch, as evidenced by key strategic initiatives in the Court's strategic agenda: "Justice 2020, A Vision for the Future of the Arizona Judicial Branch."

Much progress has been made to improve court processing and oversight of probate matters. In the late 1990s, Arizona began to regulate "professional fiduciaries," individuals and entities who serve as guardians, conservators, and personal representatives in probate cases for a fee. In June 2000, the Court appointed the Fiduciary Advisory Committee, which issued its Final Report to the Arizona Judicial Council ("AJC") in June 2001. A number of the Committee's recommendations resulted in changes to statutes, court rules, and procedures, including, for example, increased qualifications for licensed fiduciaries and authority for a judicial officer to issue a fiduciary arrest warrant. Other strategic

efforts taken over the last decade include the implementation of random audits of licensed fiduciaries and amendments to the statutory provisions regarding licensed fiduciaries serving as an agent under a power of attorney. Effective January 1, 2009, the Court adopted the Arizona Rules of Probate Procedure, which provide uniform, statewide practice standards for probate proceedings in the superior court.¹

Although significant progress has been made over the past decade, additional efforts are needed to provide for the protection of vulnerable and incapacitated persons. Key initiatives contained in “Justice 2020” include simplifying the processing of guardianship cases and ensuring fiduciaries are held accountable for the services they provide to their vulnerable clients. To accomplish these goals, Chief Justice Rebecca White Berch issued Administrative Order No. 2010-52 on April 30, 2010, establishing the Committee on Improving Judicial Oversight and Processing of Probate Matters, which disbands with delivery of this report.

Pursuant to the Administrative Order, the Committee was charged with the responsibility to consider and make recommendations regarding: (1) ways to

¹ The superior court in Arizona decides probate matters, among other case types. For ease of reference, courts and practitioners frequently refer to the superior court as the “probate court” when it decides these matters. Indeed, the name of this Committee includes the term. Use of this shorthand reference, however, may lead the public to mistakenly believe that a “probate court” exists separately from the superior court. In an attempt to dispel this impression, therefore, we refer to the “superior court” or the “court” in the body of this interim report.

streamline the process when an incapacitated or vulnerable child reaches the age of majority and is in need of a guardian and/or conservator; (2) effective court oversight and monitoring of guardianships, conservatorships, and decedent estate cases; (3) statewide fee guidelines for professional fiduciaries and attorneys paid from a ward's estate; and (4) the process used by courts to review and award fiduciary's and attorney's fees, particularly when disputed. The Committee was not authorized to investigate particular cases and did not do so. Additionally, the Committee lacked time and resources for such an undertaking. The Committee, however, received anecdotal input about problems faced in the superior court, and members of the Committee reported others. Therefore, the Committee considered the above-described issues with an eye towards how the current statutes, rules, procedures, and training regimens could be improved to foster the fair, efficient, and cost-effective handling of probate matters and further the best interests of vulnerable adults.

The Committee established and maintained a site on the Arizona Judicial Branch's website. In addition to posting pertinent documents for Committee and public view, the site invited public comment through use of a form or mailed letter. Additionally, the Committee sought public comment by identifying a list of stakeholders and asking those persons or groups to inform its members of the Committee's charge and invite comment. A list of stakeholders is set forth in

Appendix A. For example, AARP sent out information to 100,000 Arizona members soliciting comments. Further, the Committee asked the presiding judge in each county to post a notice of the request for comment outside the doors of any courtroom used for probate hearings and sent letters to all State senators and State representatives asking them to inform constituent groups about the Committee's request for input. Committee members invited comment at speaking events. Finally, the Committee's request was contained in an Arizona Republic newspaper article entitled, "Comments on Probate Court Sought," dated June 22, 2010. The Committee received approximately 200 written comments in addition to verbal comments made at public full-Committee meetings and to individual committee members outside meetings or at workgroup meetings.

The full Committee met 15 times in public meetings. The Committee formed three workgroups to consider, respectively, (1) streamlining the transition for incapacitated minors to adult guardianships and conservatorships, (2) ensuring effective court oversight of probate matters, and (3) revising processes employed to review and award fiduciary's and attorney's fees. Pursuant to authority conferred by the Administrative Order, the Chair appointed non-Committee members to join Committee members in the workgroups. A list of each workgroup's membership is set forth in Appendix B. The Committee completed the bulk of its work through these workgroups, which met publically for hundreds

of hours. To accomplish their tasks, the workgroups reviewed information from the National Center for State Courts and the laws and procedures used in courts in other states, among other things.

In October 2010, the Committee submitted an Interim Report focused primarily on potential statutory and rule changes in order to enable AJC to (1) recommend the supreme court either proceed with or refrain from making rule changes and/or suggesting the legislature make statutory changes, and (2) provide feedback to the Committee about the appropriateness of any alternative rule and statutory changes currently under consideration by the Committee. The Committee Chair presented the Interim Report at AJC's meeting held October 21, 2010, and AJC took action on these recommendations, as described hereafter.

At its meeting held June 6, 2011, the Committee voted to send this final report to AJC.

II. Executive Summary

IV. Assessments, Actions Taken, Recommendations, and Notices of Other Issues

A. Transition of Minors to Adult Guardianships and Conservatorships

1. Assessment

A number of issues are faced by parents and other custodial caregivers (collectively, “parents” for ease of reference) of incapacitated or vulnerable children who are nearing their eighteenth birthdays and are in need of guardianships or conservatorships:

(a) Parents often fail to consider the need for an adult guardianship or conservatorship until denied the right to act on behalf of their charge when, for example, visiting a physician for the first time after the child’s eighteenth birthday. When this occurs, the parent is often forced to seek an emergency, temporary guardianship order from the court. The lack of action before the child’s eighteenth birthday can cause unnecessary anxiety for the parent and adult son or daughter, place the latter’s needs in a state of flux, and increase the cost and time expended by the court, the parent, and the vulnerable young adult.

(b) Confusion reportedly exists among judicial officers regarding whether proceedings for imposition of an adult guardianship can be started while the proposed ward is a minor. As a result, proceedings before such officers are not commenced until after the child’s eighteenth birthday. In these cases, consequently, a gap exists in custodial authority over a person who needs a general or limited guardianship and/or conservatorship.

(c) Conflicts often develop between divorced parents who serve as co-guardians to an adult incapacitated son or daughter or when only one parent serves

as guardian. Both situations often upset the wards and necessitate the devotion of excessive court resources. Additionally, some confusion exists among judicial officers regarding their authority to act in these situations.

(d) The guardianship and conservatorship process is confusing for many people, which necessitates a devotion of undue time to the process, results in mistakes that hamper the parties and the court, unnecessarily compels some individuals to hire attorneys to gain an understanding of the process, and/or deters many people from engaging in the appropriate legal process.

(e) The guardianship and conservatorship process can be expensive for families, which can deter them from seeking general or limited guardianships and conservatorships. Although the court can waive fees based on the financial position of the proposed ward or protected person, the forms used by many courts to determine waiver eligibility are daunting and unfairly convey an impression that fee waiver is dependent on the entire family's finances. Fees mistakenly paid are not refunded.

(f) In 2003, the legislature amended the probate code by incorporating portions of the updated Uniform Probate Code ("UPC"), including adding provisions for limited guardianships, which give more autonomy to wards. The legislature did not include other provisions of the updated UPC, however, which emphasize that courts should consider limited guardianships before imposing

unlimited guardianships. Many well-meaning parents are unaware of the availability of limited guardianships. Additionally, judicial officers may be less familiar with limited guardianships and therefore less likely to consider them.

2. Actions Taken

On October 21, 2010, the Arizona Judicial Council adopted the following recommendations made by the Committee in its Interim Report:

Recommendation 1: The supreme court should advocate for the legislature to expand the statutory “standby” guardianship provisions in the probate code.

Recommendation 2: The supreme court should advocate for the legislature to include a statutory provision in the probate code that exclusively applies to incapacitated minors approaching adulthood.

After adoption of these recommendations, Committee members worked with the supreme court’s legislative liaison, members of the Arizona Legislature, and interest group representatives regarding necessary legislation. Ultimately, the legislature enacted Senate Bill (“SB”) 1081 (Appendix C), which Governor Janice K. Brewer signed into law on April 25, 2011. SB 1081 provides as follows, in relevant part:

(a) The bill expands “standby” guardianship procedures by authorizing a parent or spouse to appoint a guardian for an unmarried incapacitated child or spouse by any signed writing. The prior statute authorized appointment only by testamentary appointment in a will. In addition to prescribing other procedures,

SB 1081 authorizes the court to confirm in advance the appointing parent's or spouse's selection upon a finding the parent/spouse will likely become unable to care for the incapacitated person within two years, thereby granting more control and peace of mind to that parent/spouse. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 14-5301 – 14-5301.02.

(b) A party interested in an alleged incapacitated minor's welfare can initiate adult guardianship proceedings when the minor is seventeen years and 6 months of age and ask that the adult guardianship commence on the minor's eighteenth birthday. Rather than repeat any recently concluded medical evaluation process to establish incapacity, the petitioning party may satisfy the statutory obligation by providing a recent evaluation report authored by a physician, psychologist or registered nurse. A.R.S. § 14-5301.03.

(c) A party interested in a minor's welfare can initiate adult conservatorship proceedings when the minor is seventeen years and 6 months of age and ask that the adult conservatorship commence on the minor's eighteenth birthday. A.R.S. § 14-5301.04.

(d) After a minor with a conservatorship turns seventeen years of age, an interested party may petition for continuation of a conservatorship or other protective order beyond the minor's eighteenth birthday rather than reinitiating proceedings after the minor turns eighteen. A.R.S. § 14-5401(B).

(e) A party petitioning for a guardianship who seeks appointment of a parent or nonparent custodian for the alleged incapacitated person must name the court and case number of any action or proceeding in which any custodial order was previously entered regarding the proposed ward. A.R.S. § 14-5303.

The statutory amendments set forth in SB 1081 become effective July 20, 2011.

3. Additional Recommendations

Recommendation A: To implement SB 1081, the supreme court should immediately update the forms appended to Rule 38, Rules of Probate Procedure (“Probate Rule(s)”) as needed to account for the delayed effective date of court orders for guardianships/conservatorships that take effect on a minor’s eighteenth birthday.

To the Committee’s knowledge, staff for the Administrative Office of the Courts (“AOC”) has already commenced the process of updating forms to account for changes made in SB 1081.

Recommendation B: To implement SB 1081, the supreme court should immediately promulgate a rule requiring that the caption and case filing number of a conservatorship or other protective proceeding continued pursuant to A.R.S. § 14-5401 remains the same.

It is important to promulgate a rule to maintain a caption and case filing number in a matter continued pursuant to recently enacted A.R.S. § 14-5401 to make certain the fiduciary continues to have access to financial accounts and other

private information after entry of the continuation order. The Committee recommends the following new Probate Rule addition:²

Rule 5. Captions on Documents Filed With the Court

. . . .

C. CONTINUATION OF CONSERVATORSHIP OR OTHER PROTECTIVE ORDER. A PETITION TO CONTINUE A MINOR CONSERVATORSHIP OR OTHER PROTECTIVE ORDER PURSUANT TO A.R.S. §14-5401(B) SHALL BE FILED IN THE PENDING PROTECTIVE PROCEEDING CASE. IF THE COURT GRANTS THE PETITION, THE CASE NUMBER SHALL REMAIN THE SAME BUT THE CAPTION SHALL BE AMENDED TO REFLECT THAT THE CONSERVATORSHIP OR OTHER PROTECTIVE ORDER IS FOR AN ADULT.

Recommendation C: The supreme court should include within its legislative package for the 2012 session a provision authorizing the superior court to enter access orders and resolve access disputes arising between parents of adult wards. The supreme court should also ask for legislation specifying that any award of adult family support imposed pursuant to A.R.S. § 25-320(D) can be awarded by the court in probate proceedings.

A parent's legal obligation to support a child typically ceases when that child turns eighteen years of age or graduates high school, whichever occurs later. A.R.S. §§ 25-320(F) (Supp. 2008), -501(A) (2007). Under certain circumstances, however, the superior court can order either or both parents to provide support for mentally or physically disabled adult children if the disability began before the age of eighteen. A.R.S. § 25-320(E); *see also* A.R.S. § 25-501(A) ("In the case of

² Throughout this report, suggested additions to existing rules, statutes, and code provisions are noted by all-capital letters and deletions are demarcated by strike-outs.

mentally or physically disabled children, if the court, after considering the factors set forth in § 25-320, subsection D, deems it appropriate, the court may order support to continue past the age of majority.”). Not surprisingly, many adult children receiving continuing family support are adult wards. The statutes do not provide authority for the court to order visitation or to resolve disputes concerning access to adult wards, however. Judicial officers report frustration and inconsistency in resolving disputes that arise when one parent serves as a guardian or the parents serve as co-guardians. Often, these guardians had battled over parental visitation in family court proceedings when the ward was a minor; thus, it is not unusual for the highly emotional issues present in family court cases to shift to probate proceedings. Unlike in child custody and visitation disputes, however, the court in probate proceedings for adults lacks specific authority to resolve access disputes. The Committee recommends that the supreme court include within its legislative package for the 2012 session a provision that authorizes the court to impose access orders and resolve access disputes. Additionally, the court should specify that any award of adult family support imposed pursuant to A.R.S. § 25-320(D) can be awarded by the court in probate proceedings. Such authority would further the goal of SB 1081, which requires petitions for adult guardianships to include reference to prior custody proceedings. Alternatively, the Committee

recommends the supreme court grant this authority by Rule if it considers this a procedural device

3. Notice of Other Issues

(a) *Standby guardianships for minors with capacity.* As previously described, SB 1081 provides authority for a parent or spouse to appoint a guardian for an unmarried incapacitated child or spouse by any signed writing. The Committee was not charged with the responsibility of considering changes to laws and rules exclusively governing guardianships that become necessary solely as a result of a child's minority. Regardless, the Committee notes that an expanded standby provision for these guardianships would be useful. *See* A.R.S. § 14-5202 (addressing testamentary appointment of guardian for a minor). The Committee therefore urges the supreme court to point out the omission to the legislature during the 2012 session so that it may take action if it wishes to do so.

B. Judicial Oversight

1. Assessment

The number of probate cases (guardianships, conservatorships, trusts and decedent estates) pending in Arizona's courts presents challenges to providing effective judicial oversight. For example, as of the end of June 2010 (the last time fiscal year-end statistics were posted for the judiciary), 46,106 guardianships and conservatorships and 32,218 trust and decedent estate cases were pending in the

superior court statewide. *See*

[http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf#](http://www.azcourts.gov/Portals/39/2010DR/SuperiorTemporary.pdf#page=3)

[page=3](#) As of the end of June 2010, the Arizona Supreme Court had oversight responsibilities for 230 licensed fiduciaries and 48 licensed fiduciary businesses, which include the 15 county public fiduciaries and the Arizona Department of Veterans Affairs. Courts in 13 of Arizona's 15 counties do not have specialized departments to consider and decide probate cases but instead include probate cases among other case types for decision.

The Committee has identified the following issues affecting judicial oversight of guardianship and conservatorship cases:

(a) Judicial officers are not required to participate in training specific to deciding probate cases before presiding over such cases. Because most judicial officers did not practice as attorneys in probate cases, the learning curve can be sharp.

(b) Non-licensed family members or friends who petition to become guardians often lack critical information about what the position entails. Thus, post-appointment, they may realize belatedly they are ill-equipped for the position and/or fail to adequately perform their duties.

(c) Court-appointed attorneys, guardians ad litem, and court investigators are not required to participate in training specific to their roles in guardianship and conservatorship cases.

(d) The judiciary's auditing procedures are not sufficient to oversee all guardianships and conservatorships.

(e) The process for obtaining guardianships and conservatorships can be daunting to parties involved in such proceedings, which either deters use of the system or causes confusion.

(f) Confusion exists regarding the respective roles of court-appointed attorneys, guardians ad litem, and fiduciaries.

(g) Alternative dispute resolution is not always available or used when disputes arise.

(h) Only guardians are required to visit wards post-appointment, and no mechanism exists for periodic visits and reports by others to ensure the guardian or conservator is performing his or her duties appropriately.

(i) The courts often lack sufficient resources to provide needed oversight and protection of Arizona's vulnerable adults.

2. Actions Taken

On October 21, 2010, the Arizona Judicial Council approved or otherwise acted on the following recommendations made by the Committee in its Interim Report:

Recommendation 3: The supreme court should add a rule to the Probate Rules that requires funded, ongoing, unannounced post-appointment visitation of wards and protected persons.

AJC decided the Committee should study this proposal further and consider funding options. The Committee did so; additional recommendations are set forth in Recommendation E.

Recommendation 4: The supreme court should add a Probate Rule directing the superior court to create and conduct a funded program for random audits of conservatorship accountings to validate the accuracy of annual or biennial accountings currently required in all adult conservatorship matters.

AJC decided the Committee should study the funding options for this recommendation further. The Committee did so; additional recommendations are set forth in Recommendation E.

Recommendation 5: The supreme court should explore funding sources for conducting periodic visitations, reporting, training, and random audits.

AJC adopted this recommendation. Thereafter, AOC submitted a grant request entitled, “*Strengthening the Operation of Arizona Probate Courts through Statewide Education*” to the State Justice Institute (“SJI”). On April 27, 2011, SJI approved AOC’s request and issued a grant for \$30,000.00 with an additional cash

match of \$21,569.00 for the development of a probate bench book for judicial officers and video-based, on-line training for non-licensed fiduciaries, attorneys representing a proposed adult ward or protected person, and superior court investigators. In addition, these funds will be used to expand resources on the “Law for Seniors” website.

Additional recommendations regarding funding are set forth in Recommendation E.

Recommendation 6: The supreme court should develop statewide uniform training requirements for major participants in guardianship and conservatorship cases in specified ways.

AJC approved this recommendation in concept and referred the matter to the Committee on Judicial Education and Training (“COJET”)³ for further discussion and the development of a proposed program. At its meeting on December 2, 2010, COJET endorsed Recommendation 6 in concept and urged timely development of a program. The Judicial College of Arizona, which oversees education exclusively for judicial officers and reports to COJET, developed an initial program to educate judicial officers on new developments in probate. Members of the Committee will present this program at the Arizona Judicial Conference in June. Chief Justice Berch ordered all judicial officers who preside over probate matters to attend this

³ COJET assists the supreme court in developing educational policies and standards for employees of the judicial branch only.

session. Aspects of Recommendation 6 that pertain to training for judicial branch employees remains pending before COJET.

Recommendation 7: The supreme court should give priority to the development of automated case management systems that will substantially improve probate case monitoring and oversight by efficient and cost-effective means.

AJC referred this recommendation to the Commission on Technology (“COT”) to determine where development of such case management systems falls within the judiciary’s automation priorities as it works to bring all state courts into the AZTurboCourt e-filing project. This matter remains pending before COT.

Recommendation 8: The supreme court should develop uniform, interactive and dynamic electronic probate forms through AZTurboCourt or another online website that will allow documents to be electronically generated and filed. The court should prioritize phasing in AZTurboCourt for probate matters.

AJC referred this recommendation to COT to determine where development of such case management systems falls within the judiciary’s automation priorities as it works to bring all state courts into the AZTurboCourt e-filing project. This matter remains pending before COT.

3. Additional Recommendations

Recommendation D: The supreme court should appoint one person within AOC to serve as Probate Projects Coordinator to ensure implementation of all recommendations eventually adopted by the supreme court.

The Interim Report and this Report make numerous, comprehensive recommendations the Committee deems essential for improving court oversight of probate matters. Among other things, the Committee recommends the formation of task forces comprised of persons with particular expertise in probate and/or technology to create and implement various programs. Some of the jobs assigned to these task forces overlap or depend on the completion of work by other task forces or promulgation of rules. Consequently, it is imperative that someone monitor implementation of the recommendations adopted by the supreme court and coordinate the work of all task forces to maximize an efficient and effective exchange of information and to keep the execution of work on schedule. The Committee believes a single person employed by AOC would be best able to accomplish this task because AOC provides administrative services to all courts in Arizona, and it reports to the supreme court. The Committee therefore recommends appointment of a Probate Projects Coordinator to serve in this capacity at least until implementation of all recommendations adopted by the supreme court is complete.

Recommendation E: The supreme court should add a Probate Rule that requires funded, ongoing, unannounced post-appointment visitation of wards and protected persons. Alternatively, the court should add a Probate Rule that authorizes post-appointment review using a triage model.

The Probate Rules currently provide for a court investigator or court visitor

to conduct an evaluation and prepare a report for the court pertaining to the need for a proposed guardianship or conservatorship and the suitability of the proposed appointee to serve as a fiduciary. There is no mechanism for requiring annual unannounced visits and reports to the court and other interested parties by someone other than the guardian, however.⁴ In order to better detect when wards and protected persons are abused or neglected, the Committee recommended in the Interim Report that unannounced in-person visits be conducted on an annual basis to evaluate the welfare and condition of vulnerable adults under the court's protection. These visits should be documented in a report to the court. If available resources cannot support annual visits and reports, the Committee alternatively recommended a longer period of time between visits but not less than biennially.⁵

Acknowledging that the Committee considered annual or biennial visits in every case to be optimal, AJC asked the Committee to develop an alternative recommendation, considering particularly whether the court's limited resources can be used to target post-appointment visitation with wards/protected persons

⁴ The superior court in Maricopa County voluntarily operates the "Guardianship Review Program," which uses volunteer court visitors to check on the welfare of wards and protected persons and report to the court. The Committee is additionally aware that Tarrant County, Texas and Washington D.C. have well-developed court visitation programs.

⁵ The Committee's Recommendation complements one made by a Joint Task Force of the Conference of Chief Justices and the Conference of State Court Administrators on Elders and the Courts, in conjunction with the National Center for State Court's Center for Elders and the Courts, and reported in the Adult Guardianship Court Data and Issues Results from an Online Survey dated March 2, 2010 ("NCSC Report"). Recommendation 3 in the NCSC Report provides: "Each state court system should implement procedures for monitoring the performance of guardians and conservators and the well-being of incapacitated persons."

determined to be at risk for neglect or abuse. The Committee considered these factors and created two alternate programs based on a case triage model.

Triage Program A.

During the pre-appointment evaluation, the investigator or court visitor completes a risk assessment tool (see Appendix D [**workgroup 2 is finalizing**]), which requires identification of known risk factors in a given case. The tool is designed to help the court gauge the level of priority of a case for post-appointment monitoring, identify the most appropriate method of review, and choose who should conduct that review. The investigator⁶ primarily gathers the information by interviewing the prospective ward/protected person, appointed counsel, and the petitioner and by reviewing reports. Following written instructions, the investigator then assesses the ward's/protected person's current and future stability and potential for harm or loss by examining current social structure, residential environment, interdependency issues and available resources, and legal and social advocacy services. Each assessment is given a numbered score; these numbers are added together to give the potential ward or protected person a total risk level score. The scores fall into one of three ranges: minimal risk, moderate risk, maximum risk. The investigator is encouraged to provide comments and justification for deviating from a seemingly applicable scoring range. The risk

⁶ The court can assign another court employee to do the assessment or any follow up assessments warranted. For ease of reference, we refer to an investigator.

assessment tool is filed with the court as a confidential document. Thereafter, assuming appointment of a fiduciary, the judicial officer simultaneously orders a level of post-appointment follow-up 90 days prior to an annual report. For example, the court may order a telephonic interview with the ward/protected person biennially, an annual in-person visit, or a combination of actions, including a case compliance audit or forensic investigation.

Post-appointment visitations are conducted by court employees or designees, such as volunteers. Using volunteers would result in satisfying the judicial monitoring obligation at minimal cost, although a paid, full-time employee must be used to coordinate volunteers. Members of the Committee conferred with Erica Woods, ABA Commissioner on Law and Aging, who is knowledgeable about guardianship monitoring programs used throughout the United States.⁷ Ms. Woods identified several possible sources of volunteers, including retired judges,⁸ social work students, nursing students,⁹ and law school students.

⁷ Ms. Woods reported that the ABA and AARP developed a monitoring program in approximately 1991 that 53 courts used, including the superior court in Maricopa County. Funding for the programs ended after seven years; three years later only half the courts had maintained the program. The ABA and AARP are currently using SJI grant funds to update a monitoring program handbook that will be made available electronically along with forms. The supreme court should monitor their progress and obtain the handbook and forms for potential use.

⁸ Maricopa County hired a volunteer supervisor and uses retired judges. It reports difficulties with recruitment from such a small pool. Regardless, it anecdotally reports finding problems in 5% of cases in which visitation occurred.

⁹ For example, Washington D.C. partnered with five local universities to use social work students to make visits and respond to questions. The program employs a trained social worker, who recruits, trains, assists, and coordinates students in their volunteer duties. The program has

To implement Triage Model A, the supreme court should promulgate an addition to Probate Rule 30 similar to the following:

Rule 30. Guardianships/Conservatorships – Specific Procedures

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D. INDEPENDENT CASE REVIEW

1. DURING A PRE-APPOINTMENT EVALUATION OF A PROSPECTIVE ADULT WARD OR PROTECTED PERSON, AN INVESTIGATOR OR COURT VISITOR SHALL ASSESS THE RISK OF NEGLECT OR ABUSE THROUGH USE OF CRITERIA ESTABLISHED BY THE SUPREME COURT AND SET FORTH IN A FORM. THE INVESTIGATOR OR COURT VISITOR SHALL FILE THE RISK ASSESSMENT FORM WITH THE COURT UPON COMPLETION OF THE EVALUATION.

2. UPON APPOINTMENT OF A GUARDIAN OR CONSERVATOR FOR AN ADULT, THE SUPERIOR COURT SHALL CONSIDER THE RISK ASSESSMENT INFORMATION PROVIDED BY THE INVESTIGATOR OR COURT VISITOR AND THEN ORDER ONE OR MORE METHODS OF CASE REVIEW TO TAKE PLACE 90 DAYS BEFORE AN ANNUAL ACCOUNT OR GUARDIAN REPORT IS DUE IN A SPECIFIED YEAR. SUCH METHODS INCLUDE VISITATION OF THE WARD OR PROTECTED PERSON AND FINANCIAL AUDIT. THE COURT MUST ORDER SOME TYPE OF CASE REVIEW AT LEAST BIENIALLY.

3. THE COURT MAY USE VOLUNTEERS TO VISIT ADULT WARDS AND PROTECTED PERSONS. ANY VOLUNTEER MUST HAVE A BACKGROUND IN LAW, SOCIAL WORK, OR MEDICINE, PASS A CRIMINAL

eight students, who visit approximately 90 wards/protected persons each year – just under 10% of the court’s caseload.

BACKGROUND CHECK, AND UNDERGO TRAINING
AS REQUIRED BY THE COURT. ALL VOLUNTEERS
MUST FILE A WRITTEN REPORT OF THEIR
FINDINGS WITH THE COURT WITHIN 14 DAYS OF A
VISIT IN A FORMAT ESTABLISHED BY THE COURT.

Triage Program B.

This program proceeds as Triage Program A with one exception: the court has discretion to forego any post-appointment case review. Under this program, it is anticipated that the court will require some type of post-appointment review only if it concludes an adult ward or protected person is at maximum risk for neglect or abuse. The risk assessment form remains substantially similar to the one used for Triage Program A but contains options for the court to take no action post-appointment (see Appendix E [**workgroup 2 is finalizing**]). This program is necessitated when counties have insufficient resources to implement Triage Program A.

To implement Triage Model B, the supreme court should promulgate an addition to Probate Rule 30 like the following, which is substantially similar to the rule amendment recommended for Triage Program A but makes post-appointment review discretionary:

Rule 30. Guardianships/Conservatorships – Specific Procedures

. . . .

D. INDEPENDENT CASE REVIEW

1. DURING A PRE-APPOINTMENT EVALUATION OF A PROSPECTIVE ADULT WARD OR PROTECTED PERSON, AN INVESTIGATOR OR COURT VISITOR SHALL ASSESS THE RISK OF NEGLECT OR ABUSE THROUGH USE OF CRITERIA ESTABLISHED BY THE SUPREME COURT AND SET FORTH IN A FORM. THE INVESTIGATOR OR COURT VISITOR SHALL FILE THE RISK ASSESSMENT FORM WITH THE COURT UPON COMPLETION OF THE EVALUATION.

2. UPON APPOINTMENT OF A GUARDIAN OR CONSERVATOR FOR AN ADULT, THE COURT SHALL CONSIDER THE RISK ASSESSMENT INFORMATION PROVIDED BY THE INVESTIGATOR OR COURT VISITOR. AT THE COURT'S DISCRETION, IT MAY ORDER ONE OR MORE METHODS OF CASE REVIEW TO TAKE PLACE 90 DAYS BEFORE AN ANNUAL ACCOUNT OR GUARDIAN REPORT IS DUE IN A SPECIFIED YEAR. SUCH METHODS INCLUDE VISITATION OF THE WARD OR PROTECTED PERSON AND FINANCIAL AUDIT.

3. THE COURT MAY USE VOLUNTEERS TO VISIT ADULT WARDS AND PROTECTED PERSONS. ANY VOLUNTEER MUST HAVE A BACKGROUND IN LAW, SOCIAL WORK, OR MEDICINE, PASS A CRIMINAL BACKGROUND CHECK, AND UNDERGO TRAINING AS REQUIRED BY THE COURT. ALL VOLUNTEERS MUST FILE A WRITTEN REPORT OF THEIR FINDINGS WITH THE COURT WITHIN 14 DAYS OF A VISIT IN A FORMAT ESTABLISHED BY THE COURT.

Resources for independent case review

An investigator's use of the risk assessment tool in the pre-appointment stage will not result in any cost to the courts as this evaluation is already required.¹⁰ If the court implements post-appointment case evaluations, a cost will be incurred.

The Committee examined data from different sources in attempting to affix a cost to a post-appointment visitation program. According to Ms. Woods from the ABA, the cost of volunteer visitation programs at county levels has ranged from \$10,000 - \$30,000. Assuming \$30,000 is the average cost for urban counties and \$10,000 is the average cost for non-urban counties, we should anticipate an annual statewide cost of approximately \$300,000 for a visitation program.¹¹ In Ada County, Idaho, the visitation program costs on average \$50 per case.¹² In Maricopa County, the visitation program costs on average \$44 per case.¹³ Thus, the supreme court should expect any program to cost \$40 - \$50 per case for visitation. If something other than visitation is ordered, the cost will likely decrease.

The Committee has identified sources of funding for a post-appointment case review program. The supreme court could impose an additional filing fee on guardianship reports and conservatorship accounts. For instance, a \$20-\$25 fee

¹⁰ Petitioners pay approximately \$400 in fees for investigation services.

¹¹ This calculation assumes two urban counties and thirteen non-urban counties.

¹² Ada County's program uses two full-time employees and five or six volunteers. The program budget is approximately \$100,000.

¹³ Maricopa County's program uses contract court investigators for \$20 per hour. Each investigator spends approximately two to two and one-quarter hours for a visit.

imposed for filing an annual guardianship report or annual conservatorship account would generate approximately \$40-\$50 for biennial case reviews. Fees could also be assessed against fiduciaries who fail to comply with filing requirements. Because filing fees are already steep, however, the court should consider asking the legislature to impose a smaller fee on a larger group for use in case review. For example, the legislature could assess \$1 for issuance of a death certificate, which could be paid to a fund to use for post-appointment case review, including visitation. In Arizona in 2009, approximately 45,000 people died. Assuming an average of three death certificates per person were issued, the surcharge would generate \$135,000 annually. Assuming an average of five death certificates per person were issued, the surcharge would generate approximately \$225,000 annually. Another source of funding is the general fund. The supreme court should consider asking the legislature for program funding on a statewide basis. If the legislature is unable to fund the programs entirely, it could work with county governments to split funding obligations. Any filing fees should be deposited into the probate fund prescribed by A.R.S. § 14-5433. Subsection C of that provision provides authority for the court to expend moneys from the probate fund for post-appointment visitation. If the legislature funds the program from the general fund or by imposing a surcharge on death certificates, those moneys should be placed in the confidential intermediary and fiduciary fund pursuant to A.R.S. § 8-135. The

legislature should also amend subsection A of that provision to authorize use of the funds for a post-appointment case review program.

The Committee realizes that the cost and effectiveness of a post-appointment case review program is uncertain. The Committee therefore recommends that courts in urban and non-urban counties choose either Triage Program A or Triage Program B to run for six months as pilot projects. Thereafter, the supreme court can consider whether to require one, either, or a modified review program. The Committee further recommends appointment of a small task force to oversee creation, implementation, tracking and reporting of the pilot projects. The task force should be comprised of a mix of judicial officers, professional fiduciaries, investigators and court administrators familiar with probate, and a social worker. The task force should report to the Probate Projects Coordinator (see Recommendation D).

Recommendation F: The supreme court should add a Probate Rule directing the superior court to create and conduct a funded program for random audits of conservatorship accounts to validate the accuracy of annual or biennial accountings currently required in all adult conservatorship matters.

The Committee recommended in its interim report that random audits be conducted (i) by the court's own designated staff; (ii) by independent contractors solicited and retained for this purpose as court services providers; or (iii) by independent licensed fiduciaries who have contracted with the court to perform

such services. The scope of conservatorship cases subject to court-ordered random audits may be limited to cases above a certain threshold unrestricted asset amount, such as \$100,000 or \$200,000. The Committee further suggested that the supreme court should exempt from audit licensed fiduciaries, which include a county public fiduciary, the Arizona Department of Veterans Services, and private professional fiduciaries. These licensed fiduciaries are already under regulatory oversight of the Arizona Supreme Court and subject to random audit pursuant to Arizona Code of Judicial Administration § 7-201(D)(2)(b)(4).

AJC asked the Committee to review funding sources for a random audit program. The funding sources found are the same as those set forth in Recommendation D. The Committee reiterates its recommendation that the supreme court create and conduct a funded system of random audits.

Recommendation G: The supreme court should immediately develop statewide uniform training requirements for judicial officers and a bench book to comply with recently enacted A.R.S. § 14-1101.

During the 2011 legislative session, members of the Committee worked with the supreme court's legislative liaison, members of the Arizona Legislature, and interest group representatives regarding necessary legislation to improve the court's ability to oversee probate matters. Ultimately, the legislature enacted SB 1499 (Appendix D), which Governor Janice K. Brewer signed into law on April 29, 2011 with an effective date of December 31, 2011. Among other things, SB

1499 requires judicial officers presiding over probate matters to participate in training as prescribed by the supreme court. A.R.S. § 14- 1101 (eff. Dec. 31, 2011).

The Committee recommended in the interim report that judicial officers complete training focused solely on probate matters before deciding probate matters and then take a refresher course a minimum of every 5 years. Additionally, the Committee recommended development of a statewide comprehensive bench book for use as a reference by judicial officers. The Committee reiterates these recommendations and further suggests that the supreme court appoint a small task force to develop the required training regimen and a bench book that includes the practices set forth in Appendix C to the Interim Report. The task force should be comprised of a mix of judicial officers, and court administrators and attorneys experienced in probate. The Judicial College of Arizona should oversee the task force as it is responsible for judicial officer training. The Committee additionally recommends that the supreme court set a deadline for implementation of an appropriate training regimen and bench book. It is the Committee's understanding that the SJI grant money can be used to accomplish these tasks.

Recommendation H: The supreme court should develop a mandatory, uniform, online, statewide training program for all non-licensed fiduciaries.

Licensed fiduciaries handle a relatively small percentage of probate cases. Most often, a non-licensed person, such as a parent, relative, or friend of the ward, protected person, or decedent serves as the fiduciary. Many of these individuals likely have little or no idea of the requirements for serving as a fiduciary. Therefore, the supreme court should advocate for adoption of a statute or create a Probate Rule similar to A.R.S. § 25-351 *et seq.*, which requires all parents involved in a dissolution proceeding to complete a parenting class, and require all non-licensed fiduciaries to complete a training program prior to being appointed by the court as a fiduciary, unless an emergency exists. The Committee suggests the training program should not be more than 90 minutes in length, be available for viewing at all courthouses as well as Internet-based, and that an online assessment test be given and a certificate issued upon successful completion of the course. This Recommendation coincides with recommendation 2 of the NCSC Report, which suggests each court system “develop written and online materials to inform non-professional guardians and conservators about their responsibilities and how to carry out those responsibilities effectively.”

Should the supreme court prefer to achieve this recommendation by court rule rather than by urging enactment of a new statutory section, the Committee suggests that a rule be incorporated into the Probate Rules as Rule 27 under part IV, “Procedures Relating to the Appointment of Fiduciaries.” In order to maintain

uniformity with the style and structure of the existing rules, it is suggested that the proposed rule read as follows:

RULE 27.1. TRAINING FOR NON-LICENSED FIDUCIARIES.

A. ANY PERSON WHO IS NEITHER A LICENSED FIDUCIARY UNDER A.R.S. § 14-5651 NOR A FINANCIAL INSTITUTION SHALL COMPLETE A TRAINING PROGRAM APPROVED BY THE ARIZONA SUPREME COURT BEFORE LETTERS TO SERVE AS A GUARDIAN, CONSERVATOR, OR PERSONAL REPRESENTATIVE ARE ISSUED UNLESS THE APPOINTMENT WAS MADE PURSUANT TO SECTIONS 14-5310(A), 14-5401.01(A) OR 14-5207(C).

B. IF THE APPOINTMENT WAS MADE BECAUSE AN EMERGENCY EXISTED, THE FIDUCIARY SHALL COMPLETE THE TRAINING PROGRAM WITHIN THIRTY DAYS OF APPOINTMENT OR BEFORE THE PERMANENT APPOINTMENT OF THE FIDUCIARY, WHICHEVER IS EARLIER. FOR GOOD CAUSE, THE COURT MAY EXTEND THE TIME PERIOD FOR THE FIDUCIARY TO COMPLETE THE TRAINING PROGRAM.

C. FOR PURPOSES OF THIS RULE, “FINANCIAL INSTITUTION” MEANS A BANK THAT IS INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION AND CHARTERED UNDER THE LAWS OF THE UNITED STATES OR ANY STATE, A TRUST COMPANY THAT IS OWNED BY A BANK HOLDING COMPANY THAT IS REGULATED BY THE FEDERAL RESERVE BOARD, OR A TRUST COMPANY THAT IS CHARTERED UNDER THE LAWS OF THE UNITED STATES OR THIS STATE.

The Committee previously made this recommendation to AJC in its Interim Report. AJC approved the recommendation in concept and referred it to COJET for further vetting. COJET, however, has not addressed the recommendation as it

is not responsible for training persons outside the judicial branch. Consequently, the Committee reiterates the recommendation and further suggests that the supreme court appoint a small task force to develop the required training program. The task force should be comprised of licensed fiduciaries, a person familiar with programming web-based training, and court administrators and attorneys experienced in probate. The Arizona Fiduciaries Association has informed the Committee of its willingness to assist in creating training materials, including a video. The Probate Projects Coordinator (See Recommendation D) should oversee the task force. The Committee additionally recommends that the supreme court set a deadline for implementation of an appropriate training program. It is the Committee's understanding that the SJI grant money can be used to accomplish these tasks.

Recommendation I: The supreme court should rename and expand the Seniors and Probate website maintained by the judiciary to ensure all interested persons can obtain information about the duties of a fiduciary, the guardianship and conservatorship process, forms, and other resources for probate cases.

Help desks or self-service centers are not uniformly available throughout the State. By providing better resources to self-represented parties, the court will improve probate case processing and monitoring. By providing an online self-help center concerning probate issues, the supreme court would likely enhance the ability of non-licensed fiduciaries and self-represented interested parties to learn

about the process, avoid missteps, and spot abuses to point out to the court. A fine example of a self-help center for probate is found on Ramsey County, Minnesota's website, which is located at <http://www.mncourts.gov/district/2/?page=524>. See also online self-service center tools developed by Los Angeles County, California, <http://www.lasuperiorcourt.org/probate/selfhelp.htm>, and the California Administrative Office of the Courts, <http://www.courtinfo.ca.gov/selfhelp/>. Currently, the judiciary maintains a Seniors and Probate website that can be expanded to fulfill these purposes. <http://www.azcourts.gov/PublicServices/SeniorsProbateLaw.aspx> In addition, a collaborative effort between the Arizona Foundation for Legal Services and Education and the supreme court resulted in the production and ongoing funding of the Law for Seniors website, www.LawforSeniors.org, which is found on the Seniors and Probate website and can be expanded to provide additional information for seniors and for those who care for them.

The Committee previously made this recommendation to AJC in its Interim Report. AJC approved the recommendation in concept and referred it to COJET for further vetting. COJET, however, has not addressed the recommendation as it is not responsible for training persons outside the judicial branch. Consequently, the Committee reiterates the recommendation and further suggests that the supreme court appoint a small task force to develop development forms and

training materials, which can be placed online for consultation. Additionally, the task force should develop “smart forms” in conjunction with the AZTurboCourt process for ease and accuracy of filing required forms such as annual accounts. The task force should be comprised of a mix of licensed fiduciaries, court administrators and attorneys familiar with probate, and a person familiar with implementing forms into the AZTurboCourt system. The task force should coordinate with the task force appointed pursuant to Recommendation __ in developing training materials and forms to ensure efficiency and consistency. The Probate Projects Coordinator (See Recommendation D) should oversee the task force and provide coordination with the Recommendation __ task force. The Committee additionally recommends that the supreme court set a timeframe for creating the training materials and forms, placing them online, and eventually implementing smart forms in AZTurboCourt. It is the Committee’s understanding that the SJI grant money can be used to accomplish these tasks. Finally, the Committee believes the name of the website should be changed to “Law for the Incapacitated” so that it includes material relevant to both minor and adult guardianships and conservatorships.

Recommendation J: The supreme court should require any attorney wanting to be appointed as counsel or guardian ad litem for a proposed adult ward or protected person to complete a court-approved training program before accepting the first appointment.

Attorneys play vital roles in many probate cases, particularly when appointed to represent a proposed ward or protected person or to serve as a guardian ad litem. Therefore, the supreme court should create a Probate Rule requiring any attorney wanting to be appointed as counsel for a proposed adult ward or protected person or guardian ad litem for a proposed adult ward or protected person to first complete a statewide training program.¹⁴ The Rule should require attorneys with existing appointments to complete the training as soon as practicable. All attorneys accepting appointments should re-certify with a refresher training course no later than every five years. The Committee suggests the training program be Internet-based, an online assessment test be given, and a certificate issued upon successful completion of the course.

The Committee is not charged with responsibility for addressing issues relating to minor conservatorships. Nevertheless, the supreme court may wish to create a similar rule requiring training for attorneys appointed to minor guardianship and conservatorship matters.

The Committee previously made this recommendation to AJC in its Interim Report. AJC approved the recommendation in concept and referred it to COJET for further vetting. COJET, however, has not addressed the recommendation as it

¹⁴ An exception to this requirement might be made when a proposed ward or protected person wishes to hire his or her own attorney, and insufficient time exists to complete the training before assumption of the representation. The Committee will continue to discuss this issue and make a recommendation in a future report.

is not responsible for training persons employed outside the judicial branch. Consequently, the Committee reiterates the recommendation and further suggests that the supreme court appoint a small task force to develop the required training program. The task force should be comprised of a mix of judicial officers, court administrators and attorneys experienced in probate, and a person knowledgeable about programming Web-based training. The Probate Projects Coordinator (See Recommendation D) should oversee the task force. The Committee additionally recommends that the supreme court set a deadline for implementation of an appropriate training program. It is the Committee's understanding that the SJI grant money can be used to accomplish these tasks.

After creation of a training program, the Committee recommends promulgation of a Probate Rule setting forth the requirements for attorneys seeking appointments. The task force should recommend the Rule in order to tailor it to the training requirements decided upon. The Rule might appear something like the following:

RULE XX:

A. ANY ATTORNEY WHO SERVES AS A COURT-APPOINTED ATTORNEY OR GUARDIAN AD LITEM FOR A PROPOSED ADULT WARD OR ADULT PROTECTED PERSON MUST FIRST COMPLETE A TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, WHICH WILL ISSUE A CERTIFICATE OF COMPLETION. THE ATTORNEY MUST FILE A COPY OF THE CERTIFICATE OF

COMPLETION WITH THE APPOINTING COURT EITHER NO LATER THAN TEN DAYS AFTER ENTRY OF THE APPOINTMENT ORDER.

B. ANY ATTORNEY WHO IS CURRENTLY SERVING AS COURT-APPOINTED ATTORNEY OR GUARDIAN AD LITEM FOR AN ADULT WARD OR PROTECTED PERSON MUST COMPLETE A TRAINING COURSE PRESCRIBED BY THE SUPREME COURT AS SOON AS PRACTICABLE AND THEREAFTER MUST FILE A CERTIFICATE OF COMPLETION WITH THE SUPERIOR COURT.

C. AFTER COMPLETING THE INITIAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, ANY ATTORNEY WHO CONTINUES AS A COURT-APPOINTED ATTORNEY OR GUARDIAN AD LITEM FOR AN ADULT WARD OR PROTECTED PERSON MUST COMPLETE AN ADDITIONAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT EVERY FIVE YEARS AND FILE A CERTIFICATE OF COMPLETION AS SET FORTH IN SUBSECTION A.

Recommendation K: The supreme court should develop a mandatory, statewide training program and require all superior court investigators to successfully complete it before their initial appointment to a case.

Section 14-5308, A.R.S., requires each court investigator appointed by the court in an action seeking appointment of a guardian or conservator for an adult to “have a background in law, nursing or social work and [to] have no personal interest in the proceedings.” The investigators serve as the eyes and ears of the judicial officers. Thus, the supreme court should create a rule requiring any person wanting to be appointed as an investigator and meeting the statutory qualifications to complete a statewide training program. The Rule should require investigators

with existing appointments to complete the training as soon as practicable. All investigators accepting appointments should re-certify with a refresher training course no later than every five years. The Committee suggests the training program be Internet-based, an online assessment test be given, and a certificate issued upon successful completion of the course.

The Committee previously made this recommendation to AJC in its Interim Report. AJC approved the recommendation in concept and referred it to COJET for further vetting. The Education Services division of AOC is aware of the requirement and intends to develop a training plan for future consideration by COJET. The Committee reiterates the recommendation and further suggests that the supreme court appoint a small task force to develop the required training program. The task force should be comprised of a mix of judicial officers and court administrators and investigators experienced in probate, and a person knowledgeable about programming Web-based training. The Probate Projects Coordinator (See Recommendation A) should oversee the task force. The Committee additionally recommends that the supreme court set a deadline for implementation of an appropriate training program. It is the Committee's understanding that the SJI grant money can be used to accomplish these tasks.

After creation of a training program, the Committee recommends promulgation of a Probate Rule setting forth the requirements for investigators

seeking appointments. The task force should recommend the Rule in order to tailor it to the training requirements decided upon. The Rule might appear something like the following:

RULE XXX

- A. ANY PERSON WHO SERVES AS A COURT-APPOINTED INVESTIGATOR CONCERNING AN ADULT WARD OR ADULT PROTECTED PERSON MUST FIRST COMPLETE A TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, WHICH WILL ISSUE A CERTIFICATE OF COMPLETION. THE INVESTIGATOR MUST FILE A COPY OF THE CERTIFICATE OF COMPLETION WITH THE APPOINTING COURT.
- B. ANY PERSON WHO IS CURRENTLY SERVING AS A COURT-APPOINTED INVESTIGATOR CONCERNING AN ADULT WARD OR PROTECTED PERSON MUST COMPLETE A TRAINING COURSE PRESCRIBED BY THE SUPREME COURT AS SOON AS PRACTICABLE AND THEREAFTER MUST FILE A CERTIFICATE OF COMPLETION WITH THE SUPERIOR COURT.
- C. AFTER COMPLETING THE INITIAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, ANY PERSON WHO CONTINUES AS A COURT-APPOINTED INVESTIGATOR CONCERNING AN ADULT WARD OR PROTECTED PERSON MUST COMPLETE AN ADDITIONAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT EVERY FIVE YEARS AND FILE A CERTIFICATE OF COMPLETION AS SET FORTH IN SUBSECTION A.

Recommendation L: The supreme court should immediately promulgate Probate Rule and Administrative Code changes to further delineate the roles of court-appointed attorneys, guardians ad litem, and fiduciaries.

As set forth in the Interim Report, confusion regarding the respective roles of court-appointed attorneys, guardians ad litem, and fiduciaries affects judicial oversight of guardianship and conservatorship cases and can increase the fees and costs to the estates of wards and protected persons. Fiduciaries often feel obligated to attend depositions or court proceedings even though their attorney's attendance would suffice to serve the ward's or protected person's best interests. Also, the role of guardians ad litem is often undefined, leading to duplicative efforts with court-appointed attorneys, and appointment terms can last longer than necessary.

The Committee has further concluded that a fiduciary represented by counsel can competently prepare and file some documents and appear in uncontested court proceedings without the need for counsel to perform these tasks, as is currently mandated.¹⁵ Indeed, unrepresented, non-licensed fiduciaries perform such tasks routinely without attorney assistance.

To eliminate confusion regarding the respective roles of a fiduciary, an attorney appointed for a ward/protected person, and a guardian ad litem, and to eliminate unnecessary expenditures of attorney fees, the Committee recommends that the supreme court immediately promulgate the following Rules and Administrative Code changes:

¹⁵ Most if not all bonding companies require fiduciaries to retain counsel. Currently, if counsel appears of record in a case, the fiduciary is not permitted to file documents or appear in court without that counsel. Additionally, other attorneys are ethically prohibited from communicating directly with represented fiduciaries.

Arizona Rules of Probate Procedure

Rule 10. Duties Owed ~~to the Court~~ BY COUNSEL, FIDUCIARIES, AND UNREPRESENTED PARTIES

A. Duties of Counsel.

....

B. Duties of Unrepresented Parties.

....

C. Duties of Court-Appointed Fiduciaries.

1. A court-appointed fiduciary shall

....

b. REFRAIN FROM CHARGING TO ATTEND COURT PROCEEDINGS, INCLUDING DEPOSITIONS, UNLESS SUCH ATTENDANCE IS REQUIRED BY LAW, COURT ORDER, OR OTHER CIRCUMSTANCES SUCH THAT THE FIDUCIARY'S ATTENDANCE IS NECESSARY;

[LETTERING OF SUBSEQUENT, EXISTING SUBPARAGRAPHS CHANGED TO ACCOMMODATE INSERTION OF (b)]

....

D. Duties Relating to Counsel for Fiduciaries.

1. TO MINIMIZE LEGAL EXPENSES INCURRED BY THE BENEFICIARY OF THE FIDUCIARY RELATIONSHIP, A FIDUCIARY'S ATTORNEY SHALL ENCOURAGE THE FIDUCIARY TO TAKE THOSE ACTIONS THE FIDUCIARY IS AUTHORIZED TO PERFORM AND CAN PERFORM COMPETENTLY ON THE FIDUCIARY'S OWN TO FULFILL THE FIDUCIARY'S DUTIES RATHER THAN HAVING THE ATTORNEY TAKE SUCH ACTIONS ON THE FIDUCIARY'S BEHALF.

2. . . .

. . . .

RULE 10.1 FIDUCIARY'S AUTHORITY TO FILE DOCUMENTS AND APPEAR IN COURT PROCEEDINGS WHEN REPRESENTED BY COUNSEL.

A. NOTWITHSTANDING AN ATTORNEY HAVING APPEARED IN A PROBATE CASE ON BEHALF OF A FIDUCIARY, A FIDUCIARY WHO IS REPRESENTED BY AN ATTORNEY IN A PROBATE CASE MAY SIGN AND FILE DIRECTLY WITH THE COURT ANY DOCUMENT EXCEPT A MOTION, A PETITION, AN APPLICATION, OR A CLOSING STATEMENT.

B. A FIDUCIARY WHO FILES A DOCUMENT DIRECTLY WITH THE COURT PURSUANT TO THIS RULE SHALL BE RESPONSIBLE FOR SERVING A COPY OF SUCH DOCUMENT UPON THOSE PERSONS WHO, BY STATUTE, COURT RULE, OR COURT ORDER, ARE ENTITLED TO RECEIVE A COPY OF THE DOCUMENT. THE FIDUCIARY MUST ALSO PROVIDE THE FIDUCIARY'S ATTORNEY WITH A COPY OF THE DOCUMENT FILED DIRECTLY WITH THE COURT.

C. UPON MOTION BY A FIDUCIARY'S ATTORNEY OF RECORD, THE COURT MAY AUTHORIZE THE FIDUCIARY TO APPEAR WITHOUT LEGAL REPRESENTATION IN A PARTICULAR COURT PROCEEDING AND COMMUNICATE WITH ANY OPPOSING COUNSEL IN CONNECTION WITH THAT PROCEEDING.

COMMENT

THE COURT RECOGNIZES THAT FIDUCIARIES REPRESENTED BY COUNSEL MAY NOT NEED THE SERVICES OF COUNSEL TO FILE CERTAIN DOCUMENTS OR APPEAR IN CERTAIN COURT PROCEEDINGS. SOMETIMES, THE INVOLVEMENT OF COUNSEL IS UNNECESSARY AND CAN BE COSTLY TO AN ESTATE. RULE 10.1(C) PERMITS THE COURT TO AUTHORIZE THE FIDUCIARY TO APPEAR IN CERTAIN COURT PROCEEDINGS WITHOUT THE ATTORNEY OF RECORD UPON REQUEST BY THAT ATTORNEY. IT IS ANTICIPATED THAT SUCH REQUESTS WILL BE MADE FOR ROUTINE COURT APPEARANCES THAT DO NOT CONCERN CONTESTED ISSUES. TO BE

CLEAR, THIS RULE APPLIES ONLY TO COURT FILINGS AND APPEARANCES AND DOES NOT AUTHORIZE A FIDUCIARY TO DRAFT OTHER LEGAL DOCUMENTS, SUCH AS ESTATE PLANNING DOCUMENTS. WHEN A REPRESENTED FIDUCIARY APPEARS WITHOUT THE ATTORNEY OF RECORD PURSUANT TO THIS RULE, OTHER COUNSEL MAY COMMUNICATE WITH THE FIDUCIARY IN CONNECTION WITH THAT PROCEEDING ONLY WITHOUT VIOLATING THE ATTORNEY'S ETHICAL OBLIGATION MANDATED BY ARIZ. R. SUP. CT. 42, ER 4.2.

RULE 15.1 APPOINTMENT OF GUARDIAN AD LITEM.

A. A PARTY REQUESTING THE APPOINTMENT OF A GUARDIAN AD LITEM SHALL MAKE THE REQUEST IN A MOTION THAT SETS FORTH WHY THE APPOINTMENT IS NECESSARY OR ADVISABLE AND WHAT, IF ANY, SPECIAL EXPERTISE IS REQUIRED OF THE GUARDIAN AD LITEM.¹⁶

B. THE ORDER APPOINTING A GUARDIAN AD LITEM PURSUANT TO THIS SECTION SHALL CLEARLY SET FORTH THE SCOPE OF THE APPOINTMENT, INCLUDING THE REASONS FOR AND DURATION OF THE APPOINTMENT, RIGHTS OF ACCESS AS AUTHORIZED BY THIS RULE, AND THE APPLICABLE TERMS OF COMPENSATION.

C. UPON APPOINTING A GUARDIAN AD LITEM, THE COURT MAY ENTER AN ORDER AUTHORIZING THE GUARDIAN AD LITEM TO HAVE IMMEDIATE ACCESS TO THE PERSON FOR WHOM THE GUARDIAN AD LITEM HAS BEEN APPOINTED AND ALL MEDICAL AND FINANCIAL RECORDS PERTAINING TO SUCH PERSON, INCLUDING RECORDS AND INFORMATION THAT ARE OTHERWISE PRIVILEGED OR CONFIDENTIAL. UPON RECEIPT OF A CERTIFIED COPY OF SUCH ORDER, THE CUSTODIAN OF ANY RELEVANT RECORD RELATING TO A PERSON FOR WHOM A GUARDIAN AD LITEM HAS BEEN APPOINTED SHALL PROVIDE THE GUARDIAN AD LITEM WITH ACCESS TO SUCH RECORD AS AUTHORIZED BY THE COURT'S ORDER.

¹⁶ Proposed Rule 15.1(A) repeats language in current Rule 18(B), which applies to appointments of guardians ad litem and counsel. If the supreme court promulgates Rule 15.1, it should amend Rule 18(B) to excise references to guardians ad litem.

Arizona Code of Judicial Administration

Part 7: Administrative Office of the Courts

Chapter 2: Certification and Licensing Programs

Section 7-202: Fiduciaries

J. Code of Conduct.

....

- Ethics. The fiduciary shall exhibit the highest degree of trust, loyalty and fidelity in relation to the ward, protected person, or estate.

....

g. The fiduciary shall only prepare powers of attorney or other legal documents, if also certified as a legal document preparer pursuant to ACJA § 7-208, ~~except~~ PERMITTED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, OR as ordered by the court. This provision does not apply to the Arizona Department of Veterans Services pursuant to A.R.S. § 41-603(A).

Rules of the Supreme Court of Arizona

Rule 31. Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law.

....

....

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

....

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

....

30. AN OFFICER, MEMBER, OR EMPLOYEE OF A CORPORATION OR LIMITED LIABILITY COMPANY LICENSED AS A FIDUCIARY PURSUANT TO A.R.S. §14-5651 WHO IS NOT AN ACTIVE MEMBER OF THE STATE BAR MAY REPRESENT THE ENTITY BEFORE THE SUPERIOR COURT IN PROBATE PROCEEDINGS IF THE ENTITY IS NOT REPRESENTED BY COUNSEL OR TO THE EXTENT PERMITTED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, IF ALL THE FOLLOWING CONDITIONS ARE SATISFIED: (A) THE ENTITY AUTHORIZES THE OFFICER, MEMBER, OR EMPLOYEE TO REPRESENT IT IN THE PROCEEDINGS; (B) SUCH REPRESENTATION IS NOT THE OFFICER'S, MEMBER'S, OR EMPLOYEE'S PRIMARY DUTY TO THE ENTITY BUT SECONDARY OR INCIDENTAL TO OTHER DUTIES RELATED TO THE MANAGEMENT OR OPERATION OF THE ENTITY; AND (C) THE OFFICER, MEMBER, OR EMPLOYEE IS NOT RECEIVING SEPARATE OR ADDITIONAL COMPENSATION (OTHER THAN REIMBURSEMENT FOR COSTS) FOR SUCH REPRESENTATION. NOTWITHSTANDING THE FOREGOING PROVISION, THE COURT MAY REQUIRE REPRESENTATION BY AN ATTORNEY WHENEVER IT DETERMINES THAT LAY REPRESENTATION IS INTERFERING WITH THE ORDERLY PROGRESS OF THE PROCEEDINGS OR IMPOSING UNDUE BURDENS ON OTHER PARTIES. IN ADDITION, THE COURT MAY ASSESS AN APPROPRIATE SANCTION AGAINST ANY PARTY OR ATTORNEY WHO HAS ENGAGED IN UNREASONABLE, GROUNLESS, ABUSIVE OR OBSTRUCTIONIST CONDUCT.

31. NOTHING IN THESE RULES SHALL PROHIBIT A PERSON LICENSED AS A FIDUCIARY PURSUANT TO A.R.S. §14-5651 FROM PERFORMING SERVICES IN COMPLIANCE WITH RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE AND ARIZONA CODE OF JUDICIAL ADMINISTRATION, PART 7, CHAPTER 2, SECTION 7-202(J)(1)(G). THIS EXEMPTION IS NOT SUBJECT TO PARAGRAPH (C) OF THIS RULE, AS LONG AS THE DISBARRED ATTORNEY OR MEMBER HAS BEEN LICENSED AS A FIDUCIARY PURSUANT TO A.R.S. §14-5651 AND THE ARIZONA CODE OF JUDICIAL ADMINISTRATION, PART 7, CHAPTER 2, SECTION 7-202

Recommendation M: The supreme court should form a small task force to draft information for public distribution regarding key elements of the process for obtaining and overseeing adult guardianships and conservatorships.

In most protective proceedings, family members serve as guardians or conservators to their loved ones. More often than not, these family members have little or no education regarding the requirements for serving in these roles. This lack of knowledge can dissuade competent family members from taking on these roles and result in inconsistent adherence to legislative and court requirements. Also, parents of minors are often unaware of the need to obtain an adult guardianship or the mechanism for doing so until after the child becomes an adult and access to information is denied to the parent. Finally, even if a family member is not serving as guardian or conservator, they are often concerned with making sure their loved one is being protected correctly. Family members who would like to verify their loved one's case is being handled correctly are often uninformed of the rules and requirements, and therefore they do not know what to expect from the process or how to raise concerns.

The Committee recommends the supreme court form a small task force to draft information for public distribution regarding key elements of the process for obtaining and overseeing guardianships and conservatorships. The information should be broken into discrete topics and presented via writings (hard copy and digital) and videos. Pima County used an excellent video in the 1980s, which

walked lay people through the probate process. The Committee believes a statewide video or series of videos should be developed and posted on the Judicial Branch's website as well as other pertinent websites maintained by other branches. Non-licensed persons desiring to serve as fiduciaries should be required to view explanatory material before accepting an appointment to ensure their ability to comply with a fiduciary's duties and to prepare them for the role. The task force should be comprised of members of the Executive Branch who deal with incapacitated children and elder care issues, members of the probate court, a representative of a non-profit organization providing outreach to families with incapacitated children or adults, and a representative from the licensed fiduciary community.¹⁷

Recommendation N: The supreme court should appoint a small task force to develop automated case management systems together with uniform, interactive and dynamic electronic probate forms through AZTurboCourt.

As previously mentioned, AJC referred Recommendations 7 and 8 in the Interim Report to COT for placement within the judiciary's schedule of automation priorities. That matter remains pending before COT. Regardless of where these recommendations fall on the priority list, no reason exists to delay commencement of the pre-automation process. The Committee recommends the supreme court

¹⁷ The Arizona Fiduciary Association has informed the Committee on several occasions that it is developing training materials for its members and would be happy to work with the supreme court to develop similar materials for lay fiduciaries.

immediately appoint a small task force to develop automated case management systems, including the triggers of risk indicators, and create probate smart-forms for eventual use in AZTurboCourt. The task force should be comprised of persons experienced with modifying our existing case management systems and AZTurboCourt, and court administrators and judicial officers familiar with probate and the required forms. The Probate Projects Coordinator (see Recommendation D) should oversee the task force and coordinate with COT.

Recommendation O: The supreme court should amend the order to guardians, order to conservator, and order to guardian and conservator appended to Probate Rule 38 to require the fiduciary to send a copy of the order to heirs and beneficiaries.

During the Committee public comment process, several family members expressed concern about lacking information regarding the duties of a guardian or conservator. Consequently, they may not realize an issue exists that should be brought to the court's attention. Form orders appended to Probate Rule 38 set forth duties of guardians and conservators and are issued to such persons upon their appointment. The Committee recommends amending these form orders to require fiduciaries to mail copies of orders to specified persons, including wards/protected persons and family members within 30 days after letters of guardianship/conservatorship is issued. These orders will provide valuable information to the recipients regarding the guardianship/conservatorship process.

The recommended amended forms are set forth collectively in Appendix ____ (additions to forms are highlighted).

Recommendation P: The supreme court should amend Probate Rules 8 and 10 to authorize the superior court to dismiss probate cases for lack of prosecution.

Effective case management requires an understanding of how many court cases are subject to action or management at any given time. Civil and family court cases that are fully resolved by entry of judgment, decree or order of dismissal are routinely and efficiently removed from the court's list of active cases to allow court administration and judicial officers to focus their attention on managing only active cases. Not infrequently, civil and family court cases are abandoned or are slow to progress for a variety of reasons ranging from a conscious desire to abandon the case to uncertainty in how to proceed. In these cases, the court is often not notified of the reason for the parties' delay. Rule 38.1(d), Arizona Rules of Civil Procedure ("Civil Rules"), and Rules 46(B) and 91(R), Arizona Rules of Family Law Procedure ("Family Rules"), address this situation by creating an inactive calendar that places stagnant cases on a track to be dismissed after notice to the parties giving them an opportunity to proceed with the case if they desire. If no action is taken within the prescribed times, the case is dismissed by the court, and the court can focus its scarce resources in managing the smaller universe of cases that remain active.

Mechanisms in other case types also exist to ensure that inactive cases are revitalized or dismissed. Criminal and juvenile court cases are generally scheduled for mandatory hearings immediately upon the filing of criminal, delinquency or dependency proceedings with the court, and these cases proceed from hearing to hearing until final disposition. Consequently, these cases are never dormant.

Management of probate matters presents a hybrid case management system and commensurate case management difficulties. Structurally, informal and formal probates and intestacy administrations are like civil cases in some respects but different in others. These cases are filed with the clerk of court and, barring a contest or opposition, the petitioner or personal representative has the responsibility to seek appointment as personal representative, provide notice to heirs, notify and settle creditors' claims, resolve tax issues, prepare an inventory and appraisement, collect and distribute assets, and close out the estate. By statutory design, the court has more limited oversight of informal proceedings, especially when waivers are executed. Oversight is increased when formal court authority is sought for various actions. Conversely, guardianship and conservatorship cases proceed more like criminal or juvenile cases with court oversight primarily occurring at annual accountings and reports from year to year. These cases routinely terminate with a final accounting and order of accountability if these final steps do not occur. Probate Rule 3(A) incorporates the Civil Rules

into probate cases unless they are inconsistent or preempted by the Probate Rules. Presumptively, this would make Civil Rule 38.1(d) applicable to probate cases, but it has never been consistently applied to probate cases because Civil Rule 38.1(d) is driven by the civil requirement to file a motion to set and certificate of readiness within nine months of filing of the civil case; a procedure that generally has no clear corollary in probate cases. For better case management, probate cases need a common sense rule that fits within the unique procedures applicable to probate cases of various kinds.

The Committee recommends that the supreme court promulgate amendments to the Probate Rules as follows:

(Workgroup #3 working on language.)

Recommendation Q: The supreme court should ask the legislature in the 2012 term to enact legislation requiring prospective guardians and conservators for adults and prospective personal representatives in formal probates to submit to a background and credit checks.

Judicial officers report a lack of pertinent information concerning prospective guardians and conservators for adults and personal representatives in formal probates; such information is important to know to ensure that trustworthy persons serve in fiduciary positions to vulnerable persons or estates. Licensed

fiduciaries and non-family-member fiduciaries for minors must agree to a credit check and background check as a precursor to appointment. Non-licensed fiduciaries for adults and personal representatives in formal probate are not required to undergo these checks.

Oftentimes, prospective lay fiduciaries falsely claim they have never filed for bankruptcy protection or committed crimes; the court currently has no mechanism for discovering such misrepresentations. Also, fiduciaries sometimes file for bankruptcy protection or commit crimes after appointment; the court does not learn of these subsequent events. Clearly, the court should know if a prospective fiduciary had been convicted, for example, of fraud before appointing that person as a conservator for an adult. Similarly, in providing oversight to a conservatorship, the court should know if a conservator has filed for personal or professional bankruptcy, which may indicate the conservatorship should be more closely monitored.

The Committee recommends that the supreme court ask the legislature to require prospective guardians and conservators for adults and prospective personal representatives in formal probates to submit to background and credit checks as a condition for appointment. Additionally, any law should authorize the court to conduct periodic updated checks post-appointment. Upon enactment of such legislation, the court should promulgate a rule directing whether such post-

appointment checks should be conducted periodically in every case (for example, every three years) or only when ordered by the court. Finally, any rule should also require guardians and conservators for adults and personal representatives in formal probates to immediately inform the court if convicted of a felony or if the fiduciary files for personal or professional bankruptcy protection.

The supreme court should impose a fee on prospective fiduciaries for conducting the background check. Currently, the fee imposed on licensed fiduciaries and non-family-member fiduciaries for minors is \$26 in Maricopa County. Many counties already use credit checking agencies and can conduct the required credit checks at no additional cost. AOC also has such access and may be able to conduct checks for counties without credit checking agency assistance.

Recommendation R: The supreme court should promulgate Probate Rules that ensures the viability of restricted assets.

Arizona courts do not consistently require proof of the status and correct titling of restricted accounts and other assets in estates. As a result, particularly with long-lasting conservatorships, restrictions are forgotten and assets dispersed or encumbered. For example, on numerous occasions, bank employees have provided unauthorized release of a protected person's funds to a conservator upon presentation of an appointment order, not realizing that restrictions existed in letters issued by the court after the bond had posted.

Although remedies exist for unauthorized releases of restricted assets,¹⁸ the better course of action is to set forth any restrictions on a fiduciary's authority in the appointing order, require timely confirmation that repositories of restricted assets are aware of the restrictions, and require notice to third parties of any restrictions on real property. The Committee therefore recommends that the supreme court amend Probate Rule 22 as follows:

Rule 22. Bonds and Bond Companies; RESTRICTED ASSETS

A. BONDS AND BOND COMPANIES

[substance of existing subsections A and B unchanged but set forth in subsections a. and b.]

B. RESTRICTED ACCOUNTS

a. EVERY ORDER APPOINTING A CONSERVATOR OR PERSONAL REPRESENTATIVE, OR THAT AUTHORIZES A SINGLE TRANSACTION OR OTHER PROTECTIVE ARRANGEMENT PURSUANT TO A.R.S. §14-5409, SHALL PLAINLY STATE ANY RESTRICTIONS ON THE FIDUCIARY'S AUTHORITY TO MANAGE FINANCIAL ASSETS OF THE ESTATE. LETTERS OF CONSERVATOR OR PERSONAL REPRESENTATIVE SHALL NOT BE ISSUED TO ANY PERSON UNLESS THE LANGUAGE RESTRICTING THE FIDUCIARY'S AUTHORITY IS CONTAINED IN THE LETTERS.

b. IF THE RESTRICTION AFFECTS THE FIDUCIARY'S ABILITY TO MANAGE FINANCIAL ASSETS OF THE ESTATE, THE ORDER AND ANY LETTERS THAT ISSUE SHALL CONTAIN THE FOLLOWING LANGUAGE: "FUNDS SHALL BE DEPOSITED INTO AN INTEREST-BEARING,

¹⁸ A surcharge on a bond can serve as a remedy for violations of a fiduciary's duties to the estate. Similarly, if the order appointing the fiduciary restricts the fiduciary's authority over estate assets, a financial institution may be required to repay wrongfully released funds.

FEDERALLY INSURED RESTRICTED ACCOUNT AT A FINANCIAL INSTITUTION IN ARIZONA. NO WITHDRAWALS OF PRINCIPAL OR INTEREST MAY BE MADE WITHOUT CERTIFIED ORDER OF THE SUPERIOR COURT. REINVESTMENT MAY BE MADE WITHOUT FURTHER COURT ORDER SO LONG AS FUNDS REMAIN INSURED AND RESTRICTED IN THIS INSTITUTION AT THIS BRANCH.”

c. UNLESS OTHERWISE ORDERED BY THE COURT, THE FIDUCIARY SHALL FILE A PROOF OF RESTRICTED ACCOUNT FOR EVERY ACCOUNT ORDERED RESTRICTED BY THE COURT, WITHIN 30 DAYS AFTER THE ORDER OR LETTERS, WHETHER TEMPORARY OR PERMANENT, ARE FIRST ISSUED.

d. AN ATTORNEY WHO REPRESENTS THE FIDUCIARY, THE WARD, PROTECTED PERSON, INSURANCE COMPANY, OR WHO IS THE RECIPIENT OF ANY PROCEEDS FOR THE BENEFIT OF A MINOR, INCAPACITATED PERSON OR PROTECTED PERSON, SHALL BE RESPONSIBLE FOR ENSURING THE ESTABLISHMENT OF THE RESTRICTED ACCOUNT, PROPER TITLING OF THE SAME, SAFE DEPOSIT OF THE RESTRICTED FUNDS AND FILING OF A PROPERLY EXECUTED PROOF OF RESTRICTED ACCOUNT FORM EXECUTED BY AN AUTHORIZED REPRESENTATIVE OF THE FINANCIAL INSTITUTION WITHIN 30 DAYS AFTER THE ORDER OR LETTERS, WHETHER TEMPORARY OR PERMANENT, ARE FIRST ISSUED.

C. RESTRICTED ASSETS

a. EVERY ORDER APPOINTING A CONSERVATOR OR A PERSONAL REPRESENTATIVE, OR THAT AUTHORIZES A SINGLE TRANSACTION OR OTHER PROTECTIVE ARRANGEMENT PURSUANT TO A.R.S. §14-5409, SHALL PLAINLY STATE ANY RESTRICTIONS ON THE AUTHORITY TO SELL, LEASE, ENCUMBER OR CONVEY REAL PROPERTY OF THE ESTATE. NEITHER LETTERS OF CONSERVATOR OR PERSONAL REPRESENTATIVE SHALL BE ISSUED TO ANY PERSON UNLESS THE LANGUAGE RESTRICTING THE FIDUCIARY’S AUTHORITY IS CONTAINED IN THE LETTERS.

b. IF THE RESTRICTION LIMITS THE FIDUCIARY’S AUTHORITY TO MANAGE REAL PROPERTY, THE ORDER APPOINTING THE CONSERVATOR OR PERSONAL REPRESENTATIVE, OR THAT

AUTHORIZES OR RATIFIES THE TRANSACTION SHALL CONTAIN THE FOLLOWING LANGUAGE: “NO REALTY SHALL BE LEASED FOR MORE THAN ONE YEAR, SOLD, ENCUMBERED OR CONVEYED WITHOUT PRIOR COURT ORDER.”

c. UNLESS OTHERWISE ORDERED BY THE COURT, A CONSERVATOR OR PERSONAL REPRESENTATIVE SHALL FILE A CERTIFIED COPY OF THE LETTERS WITH THE OFFICE OF THE COUNTY RECORDER IN ALL COUNTIES WHERE THE ESTATE OWNS REAL PROPERTY AND FILE A COPY OF THE RECORDED LETTERS WITH THE COURT WITHIN 30 DAYS AFTER THE CONSERVATOR’S OR PERSONAL REPRESENTATIVE’S LETTERS, WHETHER TEMPORARY OR PERMANENT, ARE FIRST ISSUED.

D. ORDERS APPOINTING CONSERVATOR OR PERSONAL REPRESENTATIVE

a. EVERY ORDER APPOINTING A CONSERVATOR OR PERSONAL REPRESENTATIVE SHALL INCLUDE THE FOLLOWING LANGUAGE: “THIS ORDER DOES NOT AUTHORIZE ANY TRANSACTION. LETTERS MUST BE ISSUED.”

Finally, the Committee recommends that the supreme court amend Probate Rule 38 to add a “Proof of Restricted Account From Financial Institution” form for use in conjunction with Probate Rule 22. The Committee recommends use of the form set forth in Appendix ____.

3. Notice of Other Issues

(a) *Oversight when licensed fiduciary administers decedent’s estate without court appointment.* A member of the public reported a situation in which a licensed fiduciary is named as the personal representative in a will and then continues to manage an estate under a power of attorney without court

appointment. In that case, the court lacks the ability to oversee the actions of a licensed fiduciary and interested parties have no obvious remedy if they wish to contest fees. The Committee agreed the public member identified a potential loophole in the probate system and voted to refer the issue to the fiduciary board to examine and make recommendations, which may include statutory changes to provide a forum for aggrieved interested parties to voice complaints. The Probate Projects Coordinator (see Recommendation D) should track the progress of this referral.

(b) *Allowing probate attorneys to serve as judges pro tem in probate matters.* The Committee received comments that probate attorneys in Maricopa County sometimes also serve as judges pro tem in probate matters. As a result, an attorney in a contested probate matter may feel constrained to vigorously argue against opposing counsel who also serves as a pro tem judge for fear it may affect the outcome of a future case decided by that person in a pro tem capacity. It was also suggested that attorneys who also serve as pro tem judges may develop closer relationships with judicial officers, thereby leading to potentially improper communications. Proponents of the use of pro tem judges point out that the court

needs pro tem judges to keep pace with probate matters, and the most effective pro tem judges are attorneys experienced in probate.¹⁹

Since 2004, Maricopa County has had Administrative Order (“AO”) 2004-062 in place, which addresses use of attorneys as pro tem judges in all court departments, including probate. Significantly, the AO prohibits attorneys who serve more than 40 hours per year as a judge pro tem in any one department of the court, including probate, from practicing as an attorney in that department. Also, pro tem judges report to court administration and are prohibited from taking assignments directly from judges, thereby further limiting the relationship of collegiality between pro tem judges and regular judges. Since formation of this Committee, Maricopa County commenced using its pro tem judges in non-contested matters only.

In light of the applicable AO and Maricopa County’s reported manner of using pro tem judges in probate matters, attorneys will not be in a position of arguing against opposing counsel in a probate matter one day and appearing before that counsel in the role of pro tem judge in a contested matter the next day. Additionally, ethical rules in place for attorneys and judicial officers prohibit ex parte communications between the two while court matters are pending that

¹⁹ Desire for such expertise is not unique. *See Ariz. Code of Jud. Admin.* § 1-306(B)(1)(c) (requiring attorney pro tem judges in tax court matters to have “education and experience practicing in the area of taxation during the five years preceding the appointment.”).

involve both parties. *See* Ariz. R. Sup. Ct. 42, ER 3.5(B); Ariz. R. Sup. Ct. 81, Rule 2.9. Consequently, the Committee does not recommend the supreme court take any action at this time.

(c) *Using court commissioners to decide probate matters.* The Committee received some comments suggesting only regularly appointed or elected judges should decide probate matters in light of the importance of the issues. The superior court uses commissioners in many types of cases, including probate, to assure the efficient flow of cases.²⁰ The Committee was not charged with responsibility to investigate the qualities and expertise of particular judicial officers, was not equipped to do so, and has not done so. It is for the supreme court and the particular county courts to decide the manner of court staffing. From the Committee's perspective, what is important is that all judicial officers – judges and commissioners – are trained to effectively decide probate matters. For this reason, the Committee reports the issue but makes no recommendations regarding it.

START HERE WITH WORKGROUP 3 FEE-RELATED ISSUES

²⁰ The superior court in Maricopa County reports it no longer uses commissioners to decide contested matters in probate.